

Israel

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Introduction

This chapter discusses the Israeli law and business practice relating to commercial agents and distributors. It is divided into two sections, the first dealing with agents and the second dealing with distributors.

Issues that are common to both distributors and agents are discussed in greater depth in the section on agents, and are only cross-referenced in the section on distributors. For convenience of reference, the term ‘intermediary’ is sometimes used to encompass both agents and distributors.

Law of Agency

General Environment

The distribution of goods and services in Israel by means of local agents and distributors is widespread. A foreign entity wishing to market and distribute its products in Israel can choose between a number of different business arrangements, as follows:

- Doing business itself in Israel by means of a local branch or subsidiary;
- Retaining a local party to act as its legal agent, authorized to enter into transactions on behalf of the principal;
- Selecting a local party to serve as its marketing representative, with authority to find customers and negotiate transactions, but not to bind the foreign supplier; and
- By appointing a local distributor who buys and sells goods on its own account.

In all of these possible relationships the dominant view of Israeli law is one of respect for freedom of contract. Unlike the situation in some other countries, there are no statutes with detailed mandatory regulations regarding distributors or other types of intermediaries, and the Israeli government and legal system are unlikely to intervene in the contractual relationship freely agreed between the

foreign manufacturer or supplier and the local agent or representative. However, as discussed in greater detail below, to the extent that the parties do not clearly define their relationship, the laws of contract and agency may supply certain missing terms and conditions.

The Agency Law 1965 is based, in part, on English Common Law principles and, in part, on Continental law. 'Agency' is defined as 'the grant of power to an agent to do, in the name or in place of a principal, a legal act in respect of a third party'. A 'legal act' is an act intended to modify the rights of, or impose obligations on, the principal. A person's agent has the same status as that person himself, and an act of the agent binds or entitles the principal, as the case may be, and creates direct privity between the principal and the third party.

In general, the terminology used for various types of intermediaries is not rooted in any statutory definitions or criteria. Except for the word agent (*shaluach*), which has a defined legal meaning in agency law, and the word broker (*metavech*), which has attained a definitive legal meaning through various judicial precedents, none of the other terms used for intermediaries in Israel (for example, commission agent, franchisee, distributor, and marketing representative) provides a clear reference to the nature of legal relations between the parties.

These relations are determined by the specific contractual provisions agreed on in each case. The term used by the parties to describe the intermediary has little or no weight if it does not coincide with the nature of the contractual relationship between the parties or with their actual conduct.¹ A good example is the word agent itself, which is translated into Hebrew as either *shaluach* or *sochen*. The latter term is often used to mean a distributor and also sometimes to mean a representative (*natzig*), neither of which have definite legal definitions.

The classification of an intermediary may be important in determining the legal rights and obligations existing between the intermediary and the supplier, and between each of them and third parties. In general, the agent acts in the name or place of the supplier, within the scope of the authority given to the agent, for the purposes of the sale and marketing of the supplier's goods. The agent does not take title to the goods. Title passes directly from the supplier to the third-party customer.

General Business Climate and Trade Licensing

The Israeli business climate is full of contradictions, reflecting the underlying condition of a country that is both very Western, in terms of technology, communications, and commercial sophistication, and very much part of the Middle East, in terms of the culture, attitudes, and negotiating practices of large

1 Civ File 819/64, *Itzhar Oil Factory v Moshavei Hatzafon Aguda Haklait Mercazit Shiptuphit* (Tel Aviv Dist Ct 1966), 50 PM 82.

portions of its population. Israel has a highly educated work force, is pervasively computerized, has state-of-the-art communication technologies, and is in the process of revitalizing its transportation infrastructure.

Yet, many transactions are done in haste, and not all are fully documented. Often transactions may be concluded on a handshake, with little thought given to the details. On the other hand, an increasing number of Israeli businesses, some managed by a new breed of 'internationalized' Israeli business persons who have been educated or trained in the United States or Europe, are indistinguishable from their counterparts in Silicon Valley or Wall Street, and are accustomed to detailed and comprehensive international commercial agreements.

All businesses require licenses from local municipal authorities, and businesses in certain industries (for example, communications, banking, insurance, medicine, media, and pharmaceuticals) are also subject to special licensing and other regulations. Agents and distributors, as such, do not require a license unless they will be acting in an industry that itself is subject to licensing requirements.

Product Licensing

Pursuant to the Order for the Issuance of Import Licenses 1939, the Ministry of Industry, Commerce and Labor may issue licenses for the import of goods into Israel. Most goods can enter Israel under a general license, but certain types of products (for example, pharmaceuticals and electronics) require a special license before they can be imported and sold in Israel.

Licenses are obtained in some cases from the Ministry of Industry, Commerce and Labor, and in other cases from the relevant ministry, such as the Ministry of Communications, in the case of telephones, answering machines, and facsimile machines; or the Ministry of Health, in the case of pharmaceuticals and medical devices. Goods requiring specific licenses include medicines,² meat,³ poisons and harmful chemicals,⁴ and weapons.⁵

Import Regime, Customs, and Duties

The primary legislation dealing with the importation of goods into Israel comprises the Customs Ordinance (New Version) 1957 ('the Customs Ordinance') and the Import and Export Ordinance (New Version) 1979 ('the Import Ordinance'). The Customs Ordinance deals principally with the payment of customs duties, and authorizes the government to prohibit, limit, or regulate the import of goods. The Import Ordinance authorizes the Minister of Industry,

2 Pharmacists Ordinance (New Version) 1981.

3 Livestock Disease (Importation of Meat) Regulations 1974.

4 Dangerous Substances Law 1993.

5 Firearms Law 1949.

Commerce and Labor to issue orders for the prohibition or regulation of the importation and exportation of goods. Restrictions on the import of goods into Israel can be categorized as follows:

- Restrictions on importing goods from certain designated countries (such as those countries that restrict the importation of Israeli goods or those specified in the Trading with the Enemy Ordinance 1939);
- Restrictions on the goods themselves (to protect locally produced goods or to regulate potentially dangerous goods, such as drugs and firearms); and
- Restrictions concerning the importers themselves.

Israel has signed free trade agreements with the United States, the European Union (EU), the European Free Trade Association, and additional countries⁶ and is thus unique in having essentially duty-free access to and from some of the most important markets in the world. Unless exempt, due to the provisions of one of these agreements, goods imported to Israel are usually subject both to a customs duty, as set forth annually in the Compilation of Regulations, and to a purchase tax, which is imposed by the Ministry of Finance.

While the customs duty discriminates between local and foreign goods, the purchase tax is imposed on all goods of a given category (even if no such goods are manufactured locally in Israel), and Israel's position has been that the purchase tax is not a customs duty for purposes of the various free trade arrangements.

Israel also has laws protecting local products against unfair competition resulting from the dumping or subsidizing of foreign goods, including the Trade Levies Law 1991. Other statutes and regulations concerning the import of goods to Israel can be found scattered through various other laws, including the Trade Marks Ordinance 1979; the Consumer Protection Law 1981; and the Stabilization of the Prices of Commodities and Service Law 1985.

In addition, pursuant to the Commodities and Services (Control) Law 1957, many administrative orders have been issued concerning the maximum permissible prices for goods, and preconditions required for obtaining import licenses for various products (such as conforming with Israeli standards; the obligation to mark products in a certain manner; and the maintenance of spare parts inventory).

Exchange Control

No permit is necessary for transactions in foreign currency in Israel, whether for the performance of a distribution or agency agreement or otherwise.

⁶ See <http://www.tamas.gov.il/NR/exeres/968971B0-AE70-4E9A-A25B-DF5BDC9B2839.htm>.

Under Israeli contract law, an obligation to make a payment in foreign currency in Israel, the making of which, in that currency, is prohibited by law, shall be fulfilled by making payment in Israeli currency at the official rate of exchange on the date of payment.⁷

Tax Regime

Companies and other entities resident in Israel are subject to tax on a personal basis, ie, on their income whether derived in Israel or abroad, regardless the place of receipt of that income. Companies are subject to a corporate tax of 24 per cent together with an additional 20 to 25 per cent withholding tax on distributed dividends. Non-residents are taxable in Israel only to the extent that income is derived in Israel.

Foreign residents are also generally liable to pay capital gains on the sale or other disposition of an asset located in Israel. Israel also imposes value added tax (VAT), currently at 16 per cent, on transactions conducted in Israel, as well as transactions involving assets or activities in Israel or imports into Israel.

Israel has entered into a large number of double-taxation treaties with other countries which deal with the taxation of capital gains, dividends, interest, and royalty payments.⁸ Generally, a foreign supplier has no obligation to report to the Israeli authorities the remuneration paid to an agent in Israel who is not an employee, nor does the supplier have any obligation to withhold tax at source from the remuneration paid to such agent.

Formation of Agency and Distributor Relationship

Capacity of Parties, Registration or Licensing of Agent or Principal, and Business Forms

Any person can be an agent. Section 4 of the Agency Law provides that:

... every person is competent, as an agent, to perform any act which he has sufficient understanding to perform, but his rights and obligations shall be governed by the general rules of legal capacity.

'Person' includes corporate bodies, and even unincorporated associations and groups, such as a residents' association.⁹ In general, an agent does not need to be licensed or registered, and there is no required or customary form of business relationship between the agent and principal.

7 Contracts (General Part) Law 1973 (the 'Contract Law'), s 47.

8 For a list of double-taxation agreements to which Israel is a signatory, see: <http://www.financeisrael.mof.gov.il/FinanceIsrael/Pages/en/EconomicData/InternationalAgreements.aspx>.

9 *HP314/99 Residents' Association of 46 Shabtai Hanegbi Street, Gilo v Hefzibah Building Co*, 99(2) Takdin-District 2530, [6].

Express or Implicit Agreements and Course of Trading

Agency is conferred by written or oral authorization of the agent by the principal, or by notice to the third party by the principal, or by the conduct of the principal toward one of them.¹⁰ The test for the creation of agency by conduct of the principal is whether a reasonable person would infer an agency from such conduct. The test is, therefore, highly dependent on the specific circumstances of each case.

One case held that the signature of a supplier on a printed receipt which bears the name and address of the agent constituted a representation by the supplier to third parties that the agent is authorized to receive money on behalf of the supplier, and constitutes authorization by conduct.¹¹ Another case held that a marketing representative issuing an invoice bearing the name of the manufacturer, at a meeting between the marketer and a customer in the presence of the manufacturer, did not constitute the creation of an agency by conduct.¹²

Yet another case has indicated that authorization by conduct may also be implied by the principal's protracted silence or lack of response where the principal is aware of the agent's actions.¹³ According to section 1(a) of the Agent's Law, the formation of an agency relationship, unlike other legally undefined intermediary relationships, requires that the principal intend that the agent perform a legal action for the principal.¹⁴

Another means of creating an agency is the retroactive ratification by a principal of acts of an agent that have been performed without or in excess of authority. *Ex post facto* ratification has the effect of prior authorization, and a right acquired by another person in good faith and for value before ratification shall not be impaired.¹⁵

If the relationship is established by means other than a clear, written agreement, then the various provisions of the Agency Law will be deemed to apply, if not contradicted by the actions of the parties. The Agency Law governs the tripartite relations among principal, agent, and third party. A number of provisions in the law specify that they are applicable only in the absence of a contrary agreement of the parties or contrary intention of any one of them. Other provisions of the law are worded so as to create a legal presumption. In these instances, the parties are free to reach a different arrangement.

10 Agency Law, s 3.

11 Civ File 851/89, *Alio Institution Trading for Export v The Modern Company for Olive Press* (Jerusalem Dist Ct 1991) (Takdin).

12 Civil Appeal (Haifa) 4285/96 *Givat Oz Kibbutz v Abu Asba Gamil*, 97(2) Takdin-District 316.

13 *Tel Aviv 11662/03 Israel Discount Bank Ltd v Auto Chen Ltd* 2005 (4) Takdin Shalom 8939.

14 Civ App 3248/91, *Esther Ben Ari (Winiger) v Boron Issac Ltd*, 49(1) 870.

15 Agency Law, s 6(a).

An agency agreement, like all contracts under Israeli law, must be performed in the customary manner for such an agreement and in good faith,¹⁶ and particulars not determined by or under the contract will be determined in accordance with practice prevailing between the parties or, in the absence of such practice, in accordance with the practices customary in contracts of that kind.¹⁷

Formalities

There are no formalities required to establish an agency relationship as such. However, if one of the parties to the relationship is a corporate body, then that corporate body's internal procedures should be followed to ensure that it has authority to enter into the agency relationship.

Mandatory, Prohibited, or Reserved Activities or Purposes

The question of whether a given provision of the Agency Law is mandatory arises when the wording of the provision contains no explicit or implicit reference to a mandatory character. At least one commentator has suggested that the authority given to an agent to do 'any act which is urgent or unforeseen'¹⁸ is mandatory, although leading authority suggests that this will apply unless the parties establish otherwise in their contractual relations (ie, the provision is of a 'dispositive' nature).¹⁹

Similarly, the provisions guaranteeing reasonable reimbursement of the expenses of the agent and according the agent a lien to secure this right are dispositive, as is the provision of section 14(a), according to which an agency terminates when canceled by either the principal or agent. Unless a contrary intention appears from the agreement of the parties, an agent is deemed to agree to:

- Disclose to the principal any information, and transfer to the principal any document, relating to the subject of the agency and give the principal a report of his activities;
- Refrain from acting as agent for more than one principal relating to the same object of the agency without the consent of the principals involved;
- Refrain from self-dealing;
- Refrain from receiving from any person any benefit or promise of benefit in connection with the object of the agency without receiving the consent of the principal;
- Refrain from using, to the detriment of the principal, any information or documents coming into the agent's possession as a result of the agency; and

16 Contract Law, s 39.

17 Contract Law, s 26.

18 Agency Law, s 5(b).

19 Barak, *The Law of Agency*, vol 1 (1996), at p 691.

- In general, refrain from doing anything involving a conflict of interest between the principal, on the one hand, and the agent or another person, on the other.²⁰

Under the standard agency relationship, the agent is obligated to represent the interests of the principal, and owes a strong fiduciary duty to the principal.²¹ This is the foundation of the agency relationship. By contrast, where the agency relationship is formed with the primary intent of protecting the agent's or a third party's interest, the fiduciary duty with regard to the principal becomes secondary and incidental.²²

Operational Aspects

Actual or Presumed Authority

Unless limited by the express terms of the authorization or other agreement between the parties, the agency extends to any act reasonably or customary required for the proper carrying out of its object, or to any act that an agent acting as a director or officer is generally authorized to carry out in such circumstances,²³ but it does not, except by express authorization, extend to proceedings before any court, tribunal, or arbitrator, nor to a compromise, renunciation, or gratuitous act.²⁴

An agent may do any urgent or unforeseen act reasonably required for safeguarding the interests of the principal in connection with the object of the agency, even if such act exceeds the scope of the agent's authority.

Thus, to the extent that negotiating and concluding sales, accepting returns, making exchanges, and issuing refunds are reasonably necessary to effect the purposes of the agency, the agent is presumed to be authorized to engage in such acts. To the extent such acts, or the settling of a dispute, involve a compromise of the rights of the principal, then express authority is required. The supplier is not obligated toward any third party as a result of acts taken by the agent acting

²⁰ Agency Law, s 8.

²¹ Agency Law, s 8.

²² Civ App 1363/04, *Zelim Holdings Ltd v 'Delek' The Israeli Petrol Company Ltd* PD 59(1)325. Zelim Holdings Ltd applied for certain regulatory approvals that, if granted, would be used by Delek. To protect its interest in the regulatory approvals, Delek signed an agency agreement with Zelim which established Delek as Zelim's agent for purposes of taking actions in relation to the regulatory approvals. The court recognized that while Delek was technically the agent, the agency was formed to protect Delek's interest and, consequently, Delek bore no fiduciary duty to Zelim.

²³ Civ App 4588/96, *Israel Herme v Zalman Margolies* 2006 (2) Takdin Elyon 3710, para 16.

²⁴ Agency Law, s 5(a).

without authority or beyond the scope of his or her authority, unless the supplier represented to the third party that the agent acts on his or her behalf.²⁵

Disclosed and Undisclosed Agency

If, at the time of the performance of an act by an agent, the third party did not know of the existence of the agency or did not know the identity of the principal, the agent's act binds the principal and the agent jointly and severally, but gives rights only to the agent. However, the principal may assume any right of the agent in respect of the third party, except if the assumption would be inconsistent with the right of the agent by reason of the nature or conditions thereof, or by reason of the circumstances.²⁶

Any property that comes into the possession of the agent as a result of the agency is held by the agent as trustee of the principal. This applies even if the agent has not disclosed the existence of the agency or the identity of the principal to the third party. The principal is entitled to any profit or benefit accruing to the agent in connection with the object of the agency²⁷ whether such property, profit, or benefit was lawfully obtained, or otherwise (eg, a bribe).²⁸

Commission on Sales

The remuneration of the agent can be:

- A periodic fixed fee;
- A fee based on the time expended by the agent;
- A commission based on certain percentages of the sales price;
- A commission calculated as a fixed sum per unit;
- A commission based on future sales to a particular customer; or
- Any other arrangement agreed by the parties — if the parties have not agreed as to the remuneration of the agent, the case law and general principles of Israeli contract law imply that the remuneration is that to which the parties have customarily agreed between themselves or, if there is no such custom, that which is customarily agreed for similar work.²⁹

The law does not determine the point at which commissions are considered as having been earned. In the absence of an agreement between the parties on this point, the matter also will be determined in accordance with the practice

25 Civ. Appl. 9584/06 D.G.S., *Shirutei Delek Ltd. v. On Line Taxis Ltd.* (Dist. Ct., Jerusalem, 2008), unpublished. Civ Rehearing 1740/91, *Barclays Discount Bank v Shraga Prost* (Sup Ct 1993), 93(3) Takdin Elyon.

26 Agency Law, s 7.

27 Agency Law, s 10.

28 Barak, *The Law of Agency*, vol 2 (1996), at p 1129. Cited approvingly in Civ Appeal 4459/98, *State of Israel v Palestine Post Ltd*, 2002 (2) TD 28 (Jerusalem).

29 Contract Law, s 26.

prevailing between the parties or, in the absence of any such practice, in accordance with the practice customary in contracts of that kind.

An agent who is not an employee is required to pay value added tax on remuneration received and, if no contrary agreement has been reached between the parties, the agent may, in certain circumstances, be entitled to collect the value added tax from the principal.

In addition, in certain circumstances, there are statutory limitations on the amount of commission and on the manner in which it is paid. For example, in accordance with the Commodities and Services (Control) Law 1957, an agent cannot, without a permit from the Minister of Defense, receive or agree to receive, directly or indirectly, a commission as to any transaction pursuant to which the State of Israel orders or acquires military equipment not of Israeli manufacture.

Reimbursement of Agent's Expenses

The principal is required to indemnify the agent for any reasonable expenses incurred and for any liability reasonably assumed by the agent in the course of the performance of the agency,³⁰ including for expenses incurred in the course of unlawful activity, so long as they were incurred in the course of the agency.³¹ This is the case even if the parties have not so provided in their agreement.

Agent's Accounting Duties

In general, the agent is obligated to act toward his or her principal with loyalty and must act in accordance with the principal's instructions. In addition, provided no contrary intention appears from the agency agreement, an agent must disclose to the principal all information concerning the agency, furnish to the principal all documents concerning the object of the agency, and submit an accounting as to the agent's activities.³²

Provision of Publicity Material and Advertising

The parties are free to reach whatever arrangements they deem appropriate with respect to the provision, preparation, and control of promotional materials, and with respect to the allocation of responsibility for compliance with local standards. In the absence of such an agreed arrangement, the custom in the particular industry will prevail.

30 Agency Law, s 11.

31 Barak, *The Law of Agency*, vol 2 (1996), at p 1149. Cited approvingly in DM 6834/02, *Tal Levitt v Eldad Omer*, 2004 (1) TA 2549.

32 Agency Law, s 8(1).

Sales Quotas

The parties are free to reach whatever arrangements they deem appropriate with respect to sales quotas and the consequences of not achieving quotas. The existence of an exclusive agency does not, of itself, imply the existence of sales quotas.

Failure to Exploit Agency

This concept is not relevant under Israeli agency law.

Termination

Fixed or Indefinite Term and Express or Implied Renewal of Term

The agency terminates on its cancellation by the principal or the agent or on the death, loss of capacity, bankruptcy or, in the case of a body corporate, winding up of either one of them.³³ The parties can determine in advance, by contract, the means for terminating the agency, for example, on a specified date. If the authorization for the agency was given for the purpose of safeguarding a right of another person or of the agent himself, and such right depends on the carrying out of the object of the agency, the agency shall not be terminated on its cancellation by the principal or agent, or by their death, loss of capacity, bankruptcy, or liquidation.³⁴

So long as the agent is not aware of the termination of the agency, he or she may, in respect of the principal, regard it as continuing. If a third party does not know of the termination of the agency, the third party may regard it as continuing.³⁵

Israeli law does not require the manufacturer and the agent to enter into an agreement for any particular period, nor does it deal with renewal of agreements. When the parties have fixed a period for an agreement, but have not agreed on the manner of renewal or extension for the agreement, the agreement will terminate on the date fixed by the parties. If one of the parties terminates the agreement prior to the end of the fixed period, without good cause to do so, the termination will constitute a breach of the agreement and the party committing the breach may be required to pay damages on account of the breach.³⁶

An agreement that is silent, as to term, is considered an agreement for an indefinite term. Such an agreement may be terminated by either party on notice by that party to the other. Generally, such a notice must be furnished a 'reasonable' time in advance. The question of what is reasonable will depend on

33 Agency Law, s 14(a).

34 Agency Law, s 14(b).

35 Civ App 318/82, *Yavetz v Mediterranean Car Agency* (Sup Ct 1984) 38 (IV) PD 85.

36 Civ File 242/79, *Blechner Estate v Polgat* (Tel Aviv Dist Ct 1979), unpublished; Civ App 528/86, *Polgat v Blechner Estate* (Sup Ct 1990), unpublished.

the particular facts and circumstances, and courts have considered the agent's right to enjoy the fruits of his investment and his need to make the necessary business adjustments arising from termination.³⁷ The court cases contain instances where prior notice of two months,³⁸ three months,³⁹ six months,⁴⁰ and 12 months⁴¹ were considered reasonable. In two recent cases pertaining specifically to distributor relationships, the court held that a year's notice was reasonable.

Furthermore, another case stated that where the termination of agreement resulted from a breach of trust by the intermediary, the agreement may be terminated with immediate effect, or by an extremely short notice.⁴² A recent case by the Supreme Court called for a limited application of the "reasonable advance notice" doctrine where the agreement is silent as to term. The court held that where a written contract exists which contains a closed set of explicit conditions pertaining to the circumstances under which the contract can be terminated, the contract can be legally terminated only if these conditions materialize.

It is notable that under the facts of the case, one party (the less powerful party) was expressly granted the right to terminate the agreement with prior notice, while the other party (the larger and more powerful party) was permitted to terminate the agreement only upon the occurrence of a closed set of conditions, and received no comparable right to terminate with notice. This case is extremely recent (and, in some circles, controversial); it remains to be seen how Israeli courts will apply this precedent to other factual scenarios. In light of this ruling, where parties to an agreement that is silent as to term desire that the agreement be terminable with reasonable notice, it is advised that such termination right be expressly noted in the agreement.

A provision stating that, in the absence of a notice of termination, the agreement is renewed from time to time for an additional year does not convert the agreement into a permanent agreement, even if the agreement is renewed over a

37 Civ App (TA) 3583/04, *Denya Cosmetics Ltd v Reuven Kort* 2006 (4) Takdin-District 9944, para 5(d).

38 Civ File 2597/66, *Egged Transportation in Israel v Oigen Reis* (Tel Aviv 1966), unpublished.

39 Civ File 619/83, *Krothamararticle Assis* (Dist Ct Nazareth 1984), unpublished.

40 Civ File 215/81, *Calman Rappaport Company for Trade and Investment v 'Choten' MetalFactory* (Dist Ct Tel Aviv 1981), unpublished; Civ File 2694/85, *Azriel Avramovitz v TARA* (Dist Ct Tel Aviv 1991), unpublished.

41 Civ File 929/76, *Raphael v Assis* (Dist Ct Tel Aviv), unpublished; Civ App 442/85, *Zohar & Associates v Travenol Laboratories (Israel)* 44 (III) PD 661.

42 Civ App 80/71, *Moshiov v Pazgaz Distribution Company* (Sup Ct 1972) 26 (I) PD 360; CivApp 687/76, *Belilius v Pik* (Sup Ct 1978) 32 (II) PD721. For a claim of restitution made by the intermediary as a result of breach of fiduciary duty, see Civ App 605/88, *Tavori Soft DrinkFactory v Springs of the Western Galilee Agencies* (1974) 35 (II) PD 1 (1991).

period of many years. An agreement specifying a certain manner for extension from time to time for an additional year, which continues in effect although the particular form of extension has not been followed, becomes an agreement for which no time period has been determined, which therefore may be terminated by reasonable advance notice.⁴³

Remediable or Non-Remediable and Fundamental or Non-Fundamental Breaches

The Contracts (Remedies for Breach of Contract) Law 1970 ('Remedies Law') regulates the rights of parties to a contract where the contract has been breached or its breach is anticipated. The general rule is that the non-breaching party is entitled to specific performance of the contract, unless:

- The contract is impossible to perform;
- The enforcement of the contract consists of compelling the doing or acceptance of personal work or personal service;
- The implementation of the enforcement order requires an unreasonable amount of judicial supervision; or
- The enforcement of the contract would be unjust in the circumstances.⁴⁴

Contracts between suppliers and agents or distributors generally are considered personal service contracts based on mutual trust and personal relations, and thus the remedy of specific performance is not available.⁴⁵

A party is entitled to cancel an agreement if the other party has committed a fundamental breach of the agreement.⁴⁶ A 'fundamental breach' is a breach as to which it may be assumed that a reasonable person would not have entered into the contract had he or she foreseen the breach or its consequences, or any breach which the parties have agreed in the contract shall be regarded as fundamental. A sweeping stipulation in a contract making all breaches fundamental, without differentiating between them, is invalid unless it was reasonable at the time the contract was made.⁴⁷

Where the breach of contract is not fundamental, the injured party may rescind the contract if he or she has first given the person in breach an extension of time for its performance, and the contract has not been performed within a reasonable time after the extension was given, unless, in the circumstances of the case, the

43 Civ App 432/66, *Oygen Reis v Egged Transportation in Israel* (Sup Ct 1966) 20 (IV)PD 421. Civ. App. 5925/06, *Bloom v Anglo Saxon Agency* (Sup Ct 2008) 100(4) Takdin 2205.

44 Remedies Law, s 3.

45 Civ App 432/66, *Oygen Reis v Egged Transportation in Israel* (Sup Ct 1966) 20 (IV) PD421; Civ App 382/75, *Shor v Benhar* (Sup Ct 1976) 30 (III) PD 670; Civ App 1310/83, *Faragi v Dubeck* (Dist Ct Haifa 1984) (I) PM 504.

46 Remedies Law, s 7(a).

47 Remedies Law, s 6.

rescission of the contract is unjust. The plea that the rescission is unjust shall not be heard unless the person in breach opposes the rescission within a reasonable time after a notice of rescission is given.⁴⁸

Where the contract is rescinded, the party in breach must restore to the injured party what the party in breach has received under the contract or, if restitution is impossible or unreasonable or if the injured party so chooses, the breaching party must pay to the injured party the value of what has been received under the contract.

The injured party likewise must restore to the breaching party what the injured party has received under the contract, or, if restitution is impossible or unreasonable or if he so chooses, the injured party must pay the breaching party the value of what has been received.⁴⁹

The parties are free to agree between them that the supplier can terminate the agreement without cause. The parties may agree that the termination can occur with or without prior notice. Nonetheless, in view of the legal obligation to exercise a contract right in a customary manner and in good faith, a court may interfere with such a termination to postpone its effectiveness if the court finds that in the circumstances the termination is made in such a manner that is not customary or not in good faith.⁵⁰

The injured party is entitled to compensation for the damage caused to him by the breach and its consequences and which the person in breach foresaw, or should have foreseen, at the time the contract was made as a probable consequence of the breach.⁵¹

Where an obligation to pay a sum of money has been breached, the injured party is entitled, without proof of damage, to compensation in an amount of interest on the sum in arrears from the date of the breach to the date of payment at the full rate under the Adjudication of Interest Law 1961, unless the parties have otherwise agreed or the court prescribes a different rate.⁵²

Where the parties agree in advance on the rate of compensation (liquidated damages) in the case of breach, compensation shall be as agreed, without proof of damage. However, the court may reduce the compensation if it finds that the amount was fixed without any reasonable relation to the damage that could have been foreseen at the time the contract was made as a probable consequence of the breach.⁵³ An agreement as to liquidated damages does not by itself derogate

48 Remedies Law, s 7(b).

49 Remedies Law, s 9(a).

50 High Ct Justice 59/80, *Transportation Services Beer Sheva v Jerusalem National Labor Court* (1981) 35 (I) PD 828.

51 Remedies Law, s 10.

52 Remedies Law, s 11(b).

53 Remedies Law, s 15(a).

from the injured party's right to claim compensation or any other remedy for breach of contract.⁵⁴

Supervening Impossibility: Temporary, Indefinite, or Permanent

In general, under Israeli contract law, a party is excused from performing a contractual obligation in the event that performance is rendered impossible due to circumstances unforeseen at the time of signing. Where breach of contract is the result of circumstances that, at the time of making the contract, the person in breach did not know of or foresee, and need not have known of or foreseen, and which he or she could not have avoided, and performance of the contract under these circumstances is impossible or fundamentally different from what was agreed between the parties, the breach does not give cause for specific performance of the contract or for compensation.⁵⁵

In such circumstances, the court may, whether or not the contract has been rescinded, require each party to restore to the other party that which it has received under the contract or, at that party's choice, to pay the value thereof. The court may further require the party in breach to indemnify the injured party for expenses reasonably incurred and for liabilities reasonably contracted for performance of the contract, all if and insofar as the court deems it just to do so in the circumstances of the case.⁵⁶

The courts have defined 'unforeseeability' quite narrowly. In one case, the outbreak of hostilities between Israel and neighboring countries was not deemed unforeseeable in the reality of the Middle East. Work stoppages resulting from the civil unrest known as the *intifada* also have been held not to be unforeseeable.⁵⁷ A more recent case embraced a broader definition of unforeseeability, and the court held that an event is unforeseeable so long as the results of an exceptional event on the fundamentals of the contractual relationship could not have been foreseen.⁵⁸

Termination Indemnity

In General

Under Israeli law, unlike the law of certain European and other jurisdictions, if the supplier terminates the agreement, with or without cause, in accordance with terms of the agreement, the supplier is not required to indemnify the agent on account of the termination. Nonetheless, the supplier must exercise the contract right to terminate an agreement in a manner that is customary and in good faith.

54 Remedies Law, s 15(b).

55 Remedies Law, s 18(a).

56 Remedies Law, s 18(b).

57 Civ Case 651/92, *American Block Ltd v Gazit & Shahan* (Tel Aviv Dist Ct 1993) 38(1) Takdin706.

58 Civ App 6328/97, *Ezra Regev v Defense Ministry* 54(5) 506.

If the supplier terminates the agreement contrary to the terms of the agreement or in a manner which is not customary and in good faith, the courts may find that the supplier is required to compensate or indemnify the intermediary. Any such compensation or indemnity would not be based on specific statutory authority dealing with agents or distributors, but rather on one of the following theories.

Compensatory Damages

A termination of an agreement that constitutes a breach thereof may result in damage to the non-breaching party. The phrase 'compensation for damage' is broad and includes compensation for damage caused to the injured party by the breach and its consequences, which the person in breach foresaw or should have foreseen as a probable consequence of the breach at the time the contract was made.

Compensatory damages may cover the investments made by the agent; inventory purchased and not yet sold (in the case of a distributor); loss of future profits; and indemnification for claims against the intermediary resulting from the failure to meet obligations toward third parties as a result of the termination.

Liquidated Damages

The parties may include in the agreement a provision as to liquidated damages, but the court is entitled to reduce the liquidated damages if it finds that they were fixed without any reasonable relation to the damages that could have been foreseen at the time the contract was made as the probable consequence of the breach.

As mentioned above, an agreement as to liquidated damages shall not itself derogate from the right of the injured party to claim compensation for actual damages caused, or from any other remedy for breach of contract.⁵⁹

Compensation

In principle, a distributor or agent does not have a proprietary right in the distributorship or agency. There is no law providing that an agent or distributor is entitled to transfer its distributorship right to another, and no such general custom has been established in Israel.⁶⁰ Provisions in the agreement entitling the supplier to terminate the distributorship or agency at any time, or without prior notice, or without giving any reasons therefore, will, in any particular contract

⁵⁹ Remedies Law, s 15.

⁶⁰ Civ App 80/71, *Moshiov v Paz-Gaz Distribution Company*, 26 (I) PD 360 (1972).

situation, give further support to the general rule that the intermediary has no proprietary rights in the agency or distributorship.⁶¹

However, Israeli courts have noted that in certain instances the termination of a distributorship in which the distributor has invested many years of work and resources, without proper compensation, is marked by a certain injustice; therefore, notwithstanding the above, under certain circumstances a court might find cause for compensating an agent or a distributor for loss of the agency or distributorship on the basis of the Unjust Enrichment Law 1979.

Even though the supplier has no legal obligation in the absence of a breach on its part to compensate the intermediary for termination or non-renewal of the distributorship or agency, given the sense of injustice expressed by Israeli courts over the loss of the intermediary's investment in the distributorship or agency, it is preferable for the agency or distributorship contract to provide explicitly that:

- The intermediary has not paid any sum to the supplier for the agency or distributorship;
- The intermediary may not transfer the agency or distributorship to another;
- The supplier may terminate the agency or distributorship at any time without advance notice and without giving any reasons; and
- The intermediary is not entitled to any compensation for termination.

Commission on Post-Termination Sales

The parties are free to determine by contract whether the agent will receive commissions after the termination of the contract in connection with orders completed before or after the termination, or in connection with customers brought to the supplier by the agent.

In the event that the contract contains no explicit provisions in this regard, the court will find the existence or absence of a right to continuing commissions in accordance with the intention of the parties as appearing in the contract or, insofar as it does not so appear, as appearing from the circumstances.

Goodwill Interest Payments

The agent is not entitled to compensation for the goodwill that the agent may have developed for the supplier's product or for himself or herself as an intermediary of the supplier.⁶²

Return of Stock, Publicity Material, Accounts, Books, and Other Documents

The parties are free to contract, as they wish, in connection with the consequences of the termination of the agency. In the absence of an express agreement to the

61 Civ App 49/83, *Amisragaz American Israel Gas v Reuven*, 41 (IV) PD 269 (1988).

62 Civ App 687/76, *Belivis v Pick*, 32 (II) PD 721 (1978).

contrary, general property law rules require the property of the principal to be returned to the principal.

General custom and the requirement of good faith may also dictate that other materials relevant to the object of the agency be turned over by the agent to the principal.

Agent's Rights upon Principal's Bankruptcy

In general, the effect of the bankruptcy or winding up of either the principal or the agent is to terminate the agency. This rule is qualified by section 14(b) of the Agency Law, which provides that the agency will not terminate if:

... the authorization was given for the purpose of safeguarding a right of another person or of the agent himself and such right depends on the carrying out of the object of the agency.

In the case of the principal's bankruptcy or winding up, the agent will be entitled to retain his or her own property and will be required to return the property of the principal. Unless security has been taken by the agent, the agent will rank equally with other unsecured creditors of the principal in respect of debts owed by the principal to the agent.

Principal's Property Held by Agent and Agent's Bankruptcy

The bankruptcy or winding up of either the principal or the agent will in general terminate the agency. In the event of the bankruptcy or winding up of the agent, the property of the principal held by the agent must be returned to the principal.

Intellectual Property

Copyright

The Copyright Law 2007 protects literary and artistic expression, including computer software. Israel is a party to the Berne Convention and to the Universal Copyright Convention.

Patent

The Patents Law 1967 protects inventions involving an inventive step, with industrial or agricultural application. Israel is a member of the Paris Convention, and has enacted regulations to implement Israel's signature of the Patent Cooperation Treaty.

Designs

The Patents and Designs Ordinance 1924 protects the features of shape, configuration, pattern, or ornament of any article. Israel is a member of the Paris Convention.

Trade Marks

The Trade Marks Ordinance (New Version) 1972 protects letters, numerals, words, or signs used, or intended to be used, by a person in relation to goods or services.

There are no Israeli laws granting express or implied intellectual property licenses to agents. In general, there is no implication that an agent, by virtue of his agency, acquires any rights in the intellectual property of the principal, except such usage rights as may be reasonably necessary to enable the agent to carry out his or her obligations. The parties, however, are free to agree to extend to the agent any additional or further rights in the principal's intellectual property.

Duty to Protect Confidentiality and Prosecuting Infringement

In general, apart from the agent's obligation to act toward the principal with loyalty, there is no separate legal obligation specifically applicable to an agent to protect and keep confidential intellectual property, or to prosecute infringers, although employees owe a duty of confidentiality with respect to their employer's trade secrets.⁶³ It is customary, but neither universal nor legally required, to include specific contractual provisions requiring such actions on the part of the agent.

Most of the intellectual property laws provide that only the registered owner of the intellectual property, which in most circumstances will be the principal, may bring infringement actions, although the agreement may authorize and require the agent to bring such actions jointly with or in the name of the principal. In certain circumstances, if the agent is an exclusive licensee of a patent, the agent may have the right, but not the obligation, to bring infringement actions.

Liability for Infringements and Indemnity

Israel's intellectual property laws do not impose an obligation on the supplier to indemnify its agent or distributor for damages caused as a result of claims that the intermediary has distributed goods in violation of the intellectual property rights of third parties.

An obligation of indemnification arises, however, under Israel's agency law. If the intermediary is an agent, he or she has a right to be indemnified by the

⁶³ Unauthorized appropriation or use of trade secrets is prohibited under the Commercial Torts Law 1999.

principal for any reasonable expenditure incurred and any liability reasonably assumed in consequence of the agency.⁶⁴

Interests in New Intellectual Property

In General

The creator of an invention or copyrightable expression is the first owner of the relevant patent or copyright. In the absence of an agreement to the contrary, the fact that such person was acting as the agent of a principal does not give the principal rights to the patent or copyright, and such rights (to the new improvement, but not to the underlying technology) will remain with the agent.

If, however, the person creating the invention or copyrightable expression is an employee of the principal, and the invention or copyrightable work was created in the course of the person's employment, then the first rights thereto would lie with the employer. The parties are free to provide contractually that interests in new intellectual property will belong to the principal.⁶⁵

National Competition Law

Exclusive Markets and Territories

Exclusivity under Competition Law

In General. Competition law in Israel is based on the Restrictive Trade Business Law 1988 ('Restrictive Practices Law'). The Restrictive Practices Law is designed to regulate restrictive arrangements such as cartels, mergers, and monopolies. Section 2 of the Restrictive Practices Law defines a 'restrictive arrangement' as 'an arrangement entered into by persons conducting business, according to which at least one of the parties restricts itself in a manner liable to eliminate or reduce the business competition between it and any of the other parties to the arrangement, or between it and a person not party to the arrangement'.

Arrangements restricting price, profit, or the division of the market in accordance with geographic territory or class of customer are deemed to be restrictive arrangements. However, most agency and distribution agreements will fall within one or more of the following exceptions.

Block Exemption — Exclusive Distribution Agreement. The Controller of Restrictive Practices published regulations exempting certain types of restrictive arrangements under several major 'Block Exemptions', one of which encompasses exclusive distribution agreements.

⁶⁴ Agency Law, s 11.

⁶⁵ Copyright Law, s 34.

Exclusive distribution agreements are exempted from the prohibition on restrictive practices, subject to several circumstances in which the exemption will not apply, including where the parties are competitors or one has a monopoly; where the agreement will give the distributor a 30 per cent market share; and price fixing (but not maximum prices or recommended prices).

During 2011, an amendment was made to the exclusive distribution exemption applying its provisions to agency agreements in addition to distribution agreements.

Intellectual Property Assets. Arrangements concerning the right to use patents, designs, trade marks, and copyrights will not be deemed to be cartels if the arrangement is between the owner of the right and the licensee, and if the asset, capable of being registered under law, has been registered.

Supply Arrangements. There is no cartel where there is an arrangement between the supplier and purchaser of an asset or service in which the only restraints are obligations of the parties to buy and sell only to each other, provided that the supplier and purchaser are not both engaged in the business of manufacturing such asset. Such arrangements can be for all or any portion of the State of Israel. However, the restraints must be mutual.

Based on the above, it is possible to have exclusive territories in Israel as part of a supply arrangement. In practice, given the relatively small size of the country, most agents and distributors who bargain for and receive exclusivity obtain it with respect to the entire country.

Pre-Rulings. In addition to the specific exemptions stipulated above, exemptions or pre-rulings may be applied for on a case-by-case basis from the Restrictive Practices Controller and, similarly, the courts may issue temporary or permanent exemptions on a case-by-case basis.

Exclusivity under Contract Law

There is no clear precedent in Israel concerning whether the appointment of an 'exclusive' intermediary means that the principal is merely barred from appointing other intermediaries or that the principal itself is also forbidden from selling in the territory. The meaning of exclusivity depends on the agreement between the parties. In cases where the language of the agreement is not clear, the dispute will be resolved in accordance with generally accepted principles of interpretation or by reference to the general custom in the industry.⁶⁶

Case law indicates that the burden of proving exclusivity rests on the party claiming exclusivity.⁶⁷ With certain narrow exceptions, Israeli law does not

66 Civ App 325/79, *Danino v Fechstopil*, 35 (I) PD 51 (1981).

67 Civ App 127/86, *Ryker v Politam Ltd*, 42 (III) PD 114 (1988); reaffirmed in Civ File 1202/00, *Gamzu Letova Shaul v Lamit Import Export Ltd et al* (District, Nazareth).

contain provisions mandating the granting of exclusivity to an agent or distributor, or with respect to the scope of such exclusivity.

An agreement between the supplier and the agent or distributor that does not refer to exclusivity will not be interpreted as granting an exclusive right to the intermediary. In cases where the language of the agreement is not clear, or the intermediary claims exclusivity as a result of conduct or practice, the burden of proof as to exclusivity falls on the intermediary.⁶⁸ The court will resolve such a dispute in accordance with general principles of interpretation, giving weight to the business purpose of the transaction. The court will be inclined to interpret a contract so that performance of the contract will be reasonable from a commercial perspective.⁶⁹

Parallel Imports

Normally, the courts will not intervene to protect an exclusive agent or distributor from so-called 'parallel imports'. This question was discussed in the Supreme Court in the context of an application for permission to appeal a decision of the Tel Aviv District Court.⁷⁰

In the District Court, an injunction was granted against an importer which prohibited the competing import of Cross and Parker Pens. The injunction was granted at the request of the exclusive distributor of the pens in Israel.

The Supreme Court accepted the appeal, canceled the injunction, and held, *inter alia*, that the exclusive distributor had no proprietary right in the goodwill of the products, which right belonged to the manufacturer. The Supreme Court also decided that the exclusive distributor did not have a cause of action for unjust enrichment because the competing importer did not act 'without legal cause'.

The Supreme Court held that the interests of the public in free competition and of the individual in the freedom to choose his or her area of business endeavor should have preference over expectations of the exclusive distributor to continue its commercial relationship with its customers, uninterrupted by the activities of the competing importer, unless other circumstances prevail.

Resale Price Maintenance

Based on the portions of the Restrictive Practices Law discussed above, it appears that restrictions as to price arrived at between the supplier and intermediary, including resale price maintenance arrangements, constitute a cartel, and may be prohibited by law.

68 Civ File 458/98, *The Company for Import/Export of Tobacco Merchandise Ltd v Brill Cigars Ltd et al* (District, Tel Aviv).

69 Civ App 127/86, *Ryker v Politam*, 42 (III) PD 114 (1988).

70 Permission Civ App 371/89, *Lebovitch v Eliahu Limited* (Sup Ct 1990) 34 (II) PD 309.

If, however, an agent is selling on behalf of a principal, then, according to the laws of agency, it is as if the principal were itself selling the product, and the principal would be free to specify the selling price.

Unfair Trade Practices

The Commercial Torts Law 1999 addresses three forms of unfair competition, namely:

- Passing off;⁷¹
- False representation by a business with respect to its own or another business' business, goods, or services;⁷² and
- Unfair interference with access to another business.⁷³

The prohibition against passing off states that:

‘A business shall not cause the goods it sells or the services it offers to be mistaken for the goods or services of another business or related to another business.’

Israeli courts have narrowed the scope of the tort of passing off and required the plaintiffs to prove, first, that the goods have acquired a reputation in the community and, second, that the defendant's imitation of the goods misleads or is likely to mislead the consumer public as a result of their similarity to the plaintiff's goods.⁷⁴

Violations of the Commercial Torts Law 1999 constitute civil torts and are actionable under the Torts Ordinance, subject to the provisions of the Commercial Torts Law 1999. Section 29 of the Restrictive Practices Law prohibits a monopolist from unreasonably refusing to supply the goods or services as to which the monopoly is held.

Pursuit of Monopolies

As stated above, the Restrictive Practices Law does not prohibit monopolies; rather, it seeks to restrict such monopolies in the interest of free competition and best interest of the public. Section 26 of the Restrictive Practices Law defines monopoly as ‘the concentration in one person (the ‘monopolist’) of more than half of all of the supply or purchase of assets or of more than half of all of the provision or acquisition of services’.

Section 29 of the Restrictive Practices Law provides that ‘a Monopolist may not unreasonably refuse to provide an asset or a service over which a monopoly exists’. Moreover, section 29(a) of the Restrictive Practices Law determines that

71 Commercial Torts Law, s 1(a).

72 Commercial Torts Law, s 2.

73 Commercial Torts Law, s 3.

74 Civ. File 1001/02, *Masa Acher Ltd. v Peled*, (Dist. Ct., Tel-Aviv, 2006), unpublished.

a Monopolist may not abuse its position in the market in a manner which might reduce business competition or injure the public. The Restrictive Practices Law provides an open list of instances in which the Monopolist shall be deemed to be abusing its position in the market.⁷⁵

The Minister of Industry, Commerce and Labor is given the authority to determine that a concentration of less than 50 per cent constitutes a monopoly if the Monopolist has a decisive influence on the market for the assets or services. In addition, certain monopolies are or can be sanctioned by the State.

In the event that the Controller of Restrictive Practices decides that the ongoing activities of the Monopolist are damaging to the free competition or the public interest, he may, pursuant to section 30 of the Restrictive Practices Law, issue directives for the regulation of monopolistic activities and, in extreme cases, the Controller may file a motion to the Restrictive Practices Tribunal to order the separation of the monopoly.

In certain circumstances, a party can apply to the Restrictive Business Practices Tribunal to receive a pre-ruling that a proposed merger will not result in a monopoly.

Tying Arrangements

As elucidated by case law, tying an unrelated product to a monopolized product falls within a presumption of abuse and is therefore prohibited.⁷⁶

Discriminatory Practices

In the case of *South of Scotland Electricity Board v British Oxygen Co*,⁷⁷ brought under a law which prohibited discrimination in the tariffs of electricity supply, it was held that if unjust discrimination can be demonstrated, then the injured party had a right of restitution of the excess tariff paid.

When a similar question arose in Israel,⁷⁸ in connection with tariffs paid for the supply of gas, it was held that restitution was not available, as there are several competing gas supply companies and the petitioner could have obtained gas from a different supplier. Some laws require non-discriminatory service even where a monopoly does not exist.⁷⁹

⁷⁵ Restrictive Practices Law, s 29(a).

⁷⁶ *Restrictive Trade Practices Commis yediot Aharonot Ltd et al* (District) 1999 (2) 529, at p 591 and 592; affirmed in *Israeli Tape and Record Federation Ltd v the Restrictive Trade Practices Commissioner*, Takdin-District 2004 (2), 1724, at p 1743.

⁷⁷ *South of Scotland Electricity Board v British Oxygen Co* (1959) 2 All ER 225.

⁷⁸ Banking (Services to Client) Law, s 2.

⁷⁹ Banking (Services to Client) Law, s 2.

Post-Termination Restrictions

It is customary to provide for restrictions on competition, both during and subsequent to the termination of the agency relationship. The restrictions, to be enforceable, should be limited to a specific geographical scope and time period. If the time period is too long, or the territorial scope too broad, the restriction may be found to be a restraint of trade and an unlawful abridgment of a party's right to freedom of occupation.

The courts will usually take into account the time period and geographical scope of the restriction, the nature of the activities to be restricted, and the legitimate rights of the supplier to protection against competition by a party that has had access to business secrets and commercial and technical information, the use of which would enable it to damage its former principal.

Taxation

Business Taxes

In general, corporate businesses in Israel are subject to a corporate tax at a rate of 24 per cent of profits. Thereafter, if profits are distributed to shareholders as dividends, tax is imposed at the rate of 20 to 25 per cent of the amount of the dividend distributed.

Exposure to Local Income or Corporation Taxes

In Israel, income tax is imposed on income derived from, or generated in Israel.⁸⁰ No Israeli income tax is imposed on the direct sale of goods to Israel by a foreign supplier which does not maintain a place of business in Israel. Thus, if an Israeli third party distributor or customer orders goods directly from the supplier abroad, no Israel income tax is imposed on the transaction.

When goods are sold in Israel through an agent (*shaluach*) or branch of the supplier, the income derived from the sale accrues in Israel and is subject to Israeli tax.

However, where a tax treaty exists between Israel and the country of residence of the principal, the principal will only be subject to tax in Israel if the principal maintains a fixed place of business in Israel or if the local agent is considered to be a "dependent agent" with binding contractual authority regardless of whether or not there is a tax treaty in place, where the foreign principal and local agent are related parties, the taxable income of the local agent for Israeli tax purposes will be subject to transfer pricing principles and regulations, and arm's length rate of return or profit margin will be expected.

⁸⁰ Income Tax Ordinance, s 2(1).

Collection and Refund of Value Added Taxes

Value added tax was introduced in Israel in 1976. In general, the added value is measured by reference to the consideration received from the sale of goods or provision of services, less the costs of inputs other than wages and financing expenses. Value-added tax is imposed on business entities ('authorized dealers' is the term used by the law) at every stage in the supply chain from importation of the product through sale to the ultimate customer.

The business entities may set off value added tax paid on domestic expenditures and imports against output value added tax collected on the sale of goods or services. The value added tax rate is currently 16 per cent. Certain transactions are exempt from value added tax or subject to value added tax at a zero rate. In particular, the value added tax on the export of goods is zero-rated.

Litigation Issues**Principal's Exposure to Local Jurisdiction**

Disputes arising from agreements between suppliers and agents (except for disputes with employees, which are heard by the labor courts) are, unless otherwise agreed by the parties, under the jurisdiction of the courts of general jurisdiction (Magistrates Courts, District Courts, and the Supreme Court).

Agent Able to Receive Process for Principal

An agent, unless authorized to receive service of process for the principal, will not by virtue of his or her agency be deemed to be authorized to receive process for the principal. The parties are free to provide that the agent will be empowered to receive process on behalf of the principal.

The courts have the power to permit a plaintiff to effect service of process on an overseas defendant in certain circumstances, such as where the dispute concerns a contract that was made or is to be performed in Israel.

Agent's Authority to Initiate Suits on Behalf of Principal

An agent's authority extends to any act reasonably required for the proper performance of the object of the agency, but it does not, except by express authorization, extend to proceedings before any court, tribunal, or arbitrator. If the parties desire that the agent have authority to initiate lawsuits, they must expressly so provide.

Issues Submissible to Arbitration

Israeli law permits reference of a dispute between foreign suppliers and local intermediaries to arbitration. The arbitration agreement must be in writing, either

as a separate agreement or as a section in the agency agreement dealing with the relationship between the parties.

The parties may determine the identity of the arbitrators, the method of selection of the arbitrators, the authority of the arbitrators, the place of arbitration, the applicable law, and related matters. In the absence of a specific stipulation as to some or all of these matters, and to the extent that Israeli law governs the arbitration, the procedural rules contained in the Appendix to the Arbitration Law 1968 will apply.

Foreign Arbitration

The parties are free to provide that disputes will be resolved by arbitration in a foreign location. Provided such agreement reflects the intention of the parties, it will be respected by the Israeli courts.

Foreign Jurisdiction

Except under certain limited circumstances, the courts will respect the choice of jurisdiction agreed to by the parties. The parties are entitled to agree that a foreign court will have jurisdiction over a dispute between them. A provision as to foreign jurisdiction can be parallel or exclusive. A parallel provision is intended to widen the choice of jurisdiction to a court abroad in addition to the jurisdiction of the Israeli local courts.

An exclusive jurisdiction clause is intended to invest a particular foreign court with jurisdiction, to the exclusion of the jurisdiction of other courts. Case law indicates that a party seeking to rely on a jurisdiction clause cannot do so whilst denying the validity of the agreement.⁸¹

Whether the foreign jurisdiction clause is parallel or exclusive is determined by the intention of the parties as evidenced by the language used. A foreign jurisdiction clause will be considered exclusive if its language specifically grants authority to a certain court and denies the jurisdiction of any other court. Doubts are resolved in favor of parallel, not exclusive, jurisdiction.

Applicability of Foreign Law

The general rule is that the parties to a contract may expressly select the law to govern their contract, provided the intention expressed is *bona fide* and legal, and provided there is no reason for avoiding the choice on the grounds of public policy.⁸² In the absence of a term in the agreement specifying the substantive law that will apply, the choice of law rules as to contract applicable in Israel will prevail. These rules are, for the most part, the same as the choice of law rules of

81 Civ File 1819/92 (VCP 15014//02), *Ford Motor v P Aharon Parts Marketing Ltd* (District, Tel Aviv).

82 Civ App 3144/03, *Elbit Medical Imaging Ltd v Harefuah Servi Os De Saude S/C Ltda*, 57 (V) PD 441 (2003).

English private international law to the extent they are not contradicted by or inconsistent with Israeli law.⁸³

The rules provide that in the absence of a specific provision in a contract with respect to the law governing the contract, the courts will apply the proper law of the contract, which means the system of law by which the parties intended the contract to be governed.

Where the intention of the parties cannot be inferred from the circumstances, the contract will be governed by the system of law with which the transaction has its closest and most real connection.⁸⁴

In a legal dispute, taking place in Israel between a foreign supplier and an Israeli intermediary concerning an agreement that is to be performed in Israel, and in the absence of a specific reference to applicable law, it is reasonable to assume that an Israeli court will apply Israeli law, either because this is the inferred intention of the parties or because Israeli law is the system of law with which the dispute has its closest and most real connection in a situation where performance is to take place in Israel.⁸⁵

A party who wishes to claim that a different law applies must prove that the parties had a different intention, or convince the court that there is another jurisdiction with which the dispute has a closer connection. Where foreign law applies, only the substantive foreign law will be applied by the Israeli court. Israeli procedural law will remain applicable.

Product Liability

Agent's Liability for Principal's Defective Products

The Defective Products (Liability) Law 1980 imposes strict liability on a manufacturer for personal injury caused as a result of a defective product. A manufacturer is defined as:

- The manufacturer of the product;
- Any person who imported the product for commercial purposes;
- Any person who represents himself as the manufacturer of a product by using the manufacturer's name or trademark or in any other manner; and
- A supplier of a product whose local manufacturer or importer is not identifiable on the face of the product;⁸⁶ such supplier shall be exempt from

83 Civ App 489/99, *Ben Dayan v IDS, International*, 38 (II), PD 99 (1984).

84 Dicey and Morris, *The Conflict of Laws*, at 1061-2 (11 ed., 1988).

85 For the assumption of equality of laws, see Civ App 434/79, *Gretz v Dajani*, 35 (II) PD 351 (1989).

86 Defective Products (Liability) Law 1980, s 1.

liability if, within a reasonable time after the injured party has required him to do so, it furnishes the injured party with information enabling the injured party to find the name and full business address of the manufacturer, importer, or person from whom the supplier purchased the product.⁸⁷

The law prescribes a ceiling for the damages that may be claimed under this law, but does not derogate from the right of the injured party to bring a claim under the Civil Wrongs Ordinance or any other law.

The Consumer Protection Law 1981 governs every transaction between a dealer and a consumer. A 'dealer' is defined as a person who sells a commodity or performs a service by way of business, and includes a manufacturer.⁸⁸ A 'consumer' is defined as a person who buys a commodity or receives a service from a dealer in the course of the dealer's business mainly for personal, domestic, or family use.⁸⁹

The law deals principally with preventing misrepresentations concerning the goods in advertising, on packaging, or attached to the packaging. It also requires that the dealer describe every characteristic of the goods requiring special maintenance or special use to prevent injury. The dealer must specify the origin, manufacturer, importer, amount, weight, and the basic ingredients comprising the goods. Violation of these requirements is a criminal offense.

When a violation is committed by a legal entity, every person who was an active director, partner, or a senior administrative employee at the time the offense was committed also is guilty of the offense unless he or she proves that it was committed without his or her knowledge and that he took all reasonable measures to ensure compliance with the law.⁹⁰

Any act or omission in contravention of the provisions of the law is deemed to be a civil wrong under the Civil Wrongs Ordinance.⁹¹

Agent's and Principal's Liability for Agent's Negligence

The principal may sue the agent under the general law of contract should the agent breach the agency agreement. In addition, under section 9(a) of the Agency Law, the principal is entitled to remedies for breach of contract if the agent breaches its duty of loyalty towards the principal.

If an agent acts beyond the scope of its authority, an injured third party, unaware that the agent was acting beyond its authority, may either regard the agent as party to the act, or withdraw from the act and claim damages from the agent.

87 Defective Products (Liability) Law 1980, s 2(c).

88 Consumer Protection Law 1981, s 1.

89 Consumer Protection Law 1981, s 1.

90 Consumer Protection Law 1981, s 25(b).

91 Consumer Protection Law 1981, s 31.

However, when an agent harms a third party through acts which may reasonably be associated with the execution of the agency, the principal may be liable for the harm suffered by the third party, especially when the third party relied on the representation of agency and changed his situation to his own detriment.⁹² Both the agent and the principal may be liable for the agent's negligence and deficiency in the circumstances discussed above in connection with the Consumer Protection Law 1981.

Law of Distributorship

In General

Most of the issues dealing with distributors have been discussed in the parallel section dealing with agency, and the discussion is not repeated below. Only in cases where there is different or supplemental material concerning distribution arrangements has any additional text been included.

Environment

The distributor acts in its own name. The distributor's status is that of a purchaser towards the foreign supplier and of a seller towards the third party, which can be a wholesaler, retailer, or end user. No specific obligations are imposed on a distributor with respect to a foreign supplier under Israeli law, except in certain cases, ie, obligations arising from certain provisions of the Sale (International Sale of Goods) Law 1999.

In general, the obligations of a distributor *vis-à-vis* the foreign supplier derive from the agreement between the parties. Particulars not determined by or under the contract shall be in accordance with the practice pertaining between the parties and, in the absence of such a practice, in accordance with the practice customary in contracts of that kind.⁹³

Formation of Distributor Relationship

There are no specific laws governing contracts involving distribution arrangements, and the formation of contracts is, therefore, governed by the Contracts (General Part) Law 1973. A contract is made by way of offer and acceptance.⁹⁴ A contract may be made orally, in writing, or in some other form.⁹⁵ The Contracts Law imposes an obligation to act in customary manner

92 Civil File (Tel Aviv) 26905/05, *Kazimirski Yossi v Carmi Zvi, Segal Brothers Ltd* (not published) (2006).

93 Contract Law, s 26.

94 Contracts (General Part) Law 1973, s 1.

95 Contracts (General Part) Law 1973, s 23.

and in good faith in both negotiating a contract and fulfilling an obligation or exercising a right arising out of the contract.⁹⁶

The obligation to act in customary manner and in good faith as contained in these sections is based on the approach of the continental law, is often used by the courts, and is imposed not only in a contractual context, but also in other areas. A contract is interpreted in accordance with the intention of the parties as appearing from the contract or, insofar as it does not so appear, as appearing from the circumstances. Where a contract is capable of different interpretations, an interpretation preserving its validity is preferable to an interpretation making it void.

Expressions and stipulations in the contract that are customarily used in contracts of that kind are interpreted in accordance with the meanings assigned to them in such contracts.⁹⁷

Any particulars not determined by or under the contract shall be in accordance with the practice pertaining between the parties or, in the absence of such practice, in accordance with the practice customary in contracts of that kind, and such particulars also will be regarded as having been agreed.⁹⁸ Distribution rights are contractual, not proprietary; it follows that such rights cannot be granted forever, as this is inconsistent with commercial sense and common sense.⁹⁹

Operational Aspects

In General

The parties are free to agree as to price lists, discounts, and volume rebates, provided that such agreement is not liable to reduce competition as defined in the Restrictive Practices Law.

Credit Protection, Retention of Title, and Other Security Devices

The supplier has a number of options available to secure the performance of the obligations of the distributor, including, in particular, payment by the distributor for the goods received from the supplier. The supplier may obtain a letter of credit to secure payment; the supplier may retain title to the goods after the distributor takes possession of the goods; the supplier may allow title in the goods to pass to the distributor but take a charge over the goods as security. Security interests in movable property require registration pursuant to the Pledges Law 1967 to be effective as against third parties (including a trustee in bankruptcy or a liquidator).

96 Contracts (General Part) Law 1973, ss 12 and 39.

97 Contracts (General Part) Law 1973, s 25.

98 Contracts (General Part) Law 1973, s 26.

99 Civ App 2850/99, *Shimon ben Hamu v Tene Noga Ltd et al* (Supreme Court).

However, the registration of a pledge on movable property will not protect the creditor against a purchaser in good faith of movable property that a corporate debtor is in the business of selling and has, in fact, sold in the ordinary course of business. Accordingly, it is difficult to effect a pledge on inventory, except as part of a 'floating charge' on the assets of an ongoing business. In Israel, a floating charge may be created with respect to all or part of the assets of a company.

The charge applies to all assets of a business that fall from time to time within the primary categories defined in the charge, including inventory, capital, receivables, equipment, goodwill, and intellectual property. The charge does not prevent the pledge or from disposing of the assets in the usual course of business and attaches automatically to newly acquired assets that fall within the scope of the charge.

Moreover, a floating charge will not limit the right of a corporate debtor to create further pledges on specific assets, and such pledges will take priority over the floating charge. To achieve priority over subsequent secured creditors, the holder of a floating charge must:

- Include a provision in the agreement creating the floating charge which forbids or limits the corporate debtor from further pledging its property; and
- Register the charge and the limiting provision with the Registrar of Companies.

In the case of a winding up (corporate bankruptcy), a floating charge on a company's assets created within six months before the beginning of the winding up is, in general, considered to have no effect unless the holder of the charge is able to prove that the company was solvent immediately after the creation of the charge.

Ordering, Delivery Timetables, and Assurances

There are no laws dealing directly with this subject. The agreement of the parties will govern and, absent such agreement, the customary practice in agreements of a similar nature will govern.

Termination Indemnity

The Supreme Court, sitting in a panel of five justices, has considered the question of whether a distributor is entitled, on the basis of the Unjust Enrichment Law, to restitution for the benefit which a supplier enjoys in consequence of the termination of a distribution agreement, which benefit derives from the customer base and the goodwill of the products built up by the distributor.

The dissent argued that the distributor was entitled to compensation under an unjust enrichment theory. The majority disagreed, but nevertheless made the same award of damages, based on the failure of the supplier to give adequate notice. The majority found that, under the circumstances, a one-year notice period was appropriate. The majority did not rule out the possibility that an unjust enrichment recovery may, under the appropriate circumstances, be justified.¹⁰⁰

The decision was echoed in subsequent rulings which also stated that a distribution agreement may be terminated with a notice period that is appropriate considering the circumstances. In some cases the court has found a one-year notice period to be appropriate;¹⁰¹ in others, half a year was deemed sufficient.¹⁰²

Liability for Infringements and Indemnity

The United Nations Convention on Contracts for the International Sale of Goods (CISG) has been incorporated into Israeli law by means of the Sale (International Sale of Goods) Law 1999 (the "Sale of Goods Law"). A distributor who buys goods from a foreign supplier domiciled in a country that is a signatory to the CISG has certain rights under Section 42 of the Sale of Goods Law, which reads as follows:

- (A) The seller must deliver goods free of any right or claim of any third party based on industrial property rights or other intellectual property rights, where the seller was aware of such rights at the time he entered into the contract, or could not have been unaware of such rights at such time, provided that the right or claim is based on industrial property or other intellectual property rights:-
 - 1. under the laws of the country where the goods will be re-sold or used, if at the time of entering into the contract the parties intended for the goods to be re-sold or used in such country;
 - 2. in all other cases- under the laws of the buyer's domicile.
- (B) The obligation of the distributor under subsection (A) shall not apply in the following instances:
 - 1. At the time of entering into the contract, the buyer was aware of the right or claim or could not have been unaware of such right or claim.

100 Civ App 442/85, *Zohar & Associates v Travenol Laboratories (Israel)*, 44 (III) PD 661.

101 Civ App 1516/05, *Lamit Holdings Ltd v Menashe H Elishar Ltd*, 2005 (1) Takdin Elyon, 2256.

102 Civ File 10013/97, *Bahij Kauer v Rio Netanya Ice-Cream Company Ltd* (Nazareth). Civil Appeal 1036/95, *Nehushtan Investment Co v Schindler Lifts*, 51 Dinim Elyon 190; Civ File (Haifa) 1299/93, *Walter Jacob v Leo Goldenburg*, 96(3) Takdin-District 2133.

2. The right or claim arises from the distributor's compliance with technical plans, models, formulas, or other specifications provided by the buyer.

The buyer's rights above are contingent on the provision of timely notice to the supplier, unless the buyer has actual notice of such third-party right or claim. The provisions above are inapplicable to sales of certain types of goods, and can be waived or modified by a properly executed contract. Thus, a distributor who sells goods in unwitting violation of third-party intellectual property rights may at times claim indemnification from the supplier located in a treaty state based on the above provisions, unless the parties have otherwise agreed.

National Competition Law

On 30 January 1990, the Supreme Court, sitting as the High Court of Justice, decided a case dealing with the validity of a condition in the Commodities and Services Control Order (Television Receivers, Remote Control and Devices to Record and Broadcast Videotapes) 1972. The order provides that:

. . . no import license will be granted unless the supplier of the receivers with respect to which the import license is requested is the manufacturer of the receivers or the exclusive agent of such manufacturer for the marketing of the receivers in Israel.

The court held that the condition is not valid, on the grounds that it prejudices the public economic interest and does not serve the goal of protecting the consumer on whose behalf the court assumed the condition was made.¹⁰³

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103 High Court of Justice 344/89, *HSH International Trade v Minister of Commerce and Industry* (unpublished), HP 254/02, *Dov Moran et al v Egged Transportation in Israel* (Tel Aviv, District).